

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
VALDOSTA DIVISION

TERRY VAN WILLIAMS,

Plaintiff

VS.

7 : 03-CV-120 (HL)

CHARLES BRYANT, COLIN MILLISON,
SHANNON KINGSTON, TRENT EXUM,
JUSTIN ELLIS, PHILLIP COWART, and
CHRIS GRIFFIN,

Defendants.

RECOMMENDATION

Presently pending in this § 1983 action is the defendants' Motion to Dismiss, wherein they seek dismissal of this action based on the plaintiff's failure to attend his December 23, 2004, deposition in Adel, Georgia. The plaintiff filed this action in October 2003, raising claims regarding the conditions of his confinement at the Cook County Jail between September and December 2001 and February 2002. Plaintiff was apparently released from prison at some point thereafter and presently resides in California.

The defendants filed their answer on September 24, 2004, resulting in the closing of discovery on or about December 24, 2004. On December 7, 2004, the defendants served the plaintiff with a Notice of Deposition, wherein they set the deposition of the plaintiff to take place in Adel, Georgia on December 23, 2004. Defense counsel served this notice on the plaintiff at his last known address in California. The plaintiff failed to appear for his deposition and on December 30, 2004, defense counsel filed a Motion to Dismiss, or in the alternative, Motion for

Extension of Discovery, Motion to Compel Plaintiff's Deposition, and Motion for Attorney's Fees.

The defendants seek dismissal of this action pursuant to Rule 37 (b)(2)(C) and Rule 37 (d) of the Federal Rules of Civil Procedure, which provide for the dismissal of an action based upon a party's failure to appear at a properly noticed deposition. In response thereto, the plaintiff maintains that he traveled from California to Georgia on December 22, 2004, and that he did not receive notice of the deposition until after he returned to California on or about January 8, 2005. Plaintiff asserts that the Notice of Deposition was among several pieces of his mail that were delivered to the wrong address by a new mail carrier and that the Notice was not properly delivered to his address until after he had traveled to Georgia on December 22, 2004. In support of his assertions, the plaintiff has attached copies of his airline ticket stubs showing the relevant travel dates and has provided various contact information for the postal authorities in California.

The undersigned concludes that the plaintiff has shown good cause and substantial justification for his failure to appear at the deposition scheduled for December 7, 2004. The court notes that the plaintiff did not fail to keep the court and defense counsel informed as to his current address and that plaintiff states his willingness to appear for a deposition scheduled in the future. Accordingly, it is the recommendation of the undersigned that the defendants' Motion to Dismiss be **DENIED**. Pursuant to 28 U.S.C. § 636(b)(1), the parties may file written objections to this recommendation with the Honorable Hugh Lawson, United States District Judge, **WITHIN TEN (10) DAYS** of receipt thereof.

The alternative portions of defendants' motion will be addressed by separate order, if and when the district judge to whom this matter is assigned adopts this recommendation.

SO RECOMMENDED, this 9th day of June, 2005.

/s/ *Richard L. Hodge*
RICHARD L. HODGE
UNITED STATES MAGISTRATE JUDGE

asb